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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 527

UNITED FUEL GAS COMPANY, *Appellant,*

*—against—*

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

## BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM AND REPLYING TO MEMORANDUM OF AMICI CURIAE

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March 24, 1964

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This brief is submitted in response both to the motion to dismiss or affirm filed by appellee (Motion) and the memorandum for the United States and the Federal Power Commission (Memorandum). Because the Solicitor General concludes that the Court should review the Guidelines question we turn to it first.

1. *Guidelines.* The Solicitor General concluded that appellant is constitutionally entitled to a rate determination by the West Virginia Commission based on a correct under-

standing of federal law, Section 167 of the Internal Revenue Code and Revenue Procedure 62-21, and that the state agency misapprehended such law. To this recognition of merit, we will only add (by way of reaffirming our position set forth in the jurisdictional statement) that this Court's review should not be limited to the state agency's misapprehension of federal law but should include consideration of the state action in this case as in affirmative conflict with Section 167 and valid administrative regulations promulgated thereunder.

Turning to the Motion, appellee's sole contention is that appellant was tardy in arriving at a decision on the use of Guideline lives and hence cannot be heard to complain now. The Solicitor General expressed no view on this question and it was not discussed in the jurisdictional statement because it was never thought to be at issue. The record makes clear that the majority of the West Virginia Commission in no way based its decision upon the time appellant required to consider the new Guidelines procedures. The present belated contention therefore was not a considered state ground below and, in any event, the following chronology shows that it could not be deemed adequate.

On July 11, 1962, the Guidelines were first published. They constituted a radical revision of existing federal tax regulations as to lives of depreciable property (embodied in the old "Bulletin F" under the Internal Revenue Code of 1939). This publication was of enormous significance to American business. The official release of the Office of Tax Analysis of the Office of the Secretary of Treasury made emphatically clear that substantial study would be required:

> ". . . The Revenue Procedure requires each business to justify its depreciation claims by a consistent replacement of assets in conformity with the depreciable life by demonstrating through its main-

> tenance of an appropriate depreciation reserve against its investment that its replacement of equipment corresponds to the depreciable life claimed."*

The Guidelines regulations were extremely complex and recognized that extensive study by taxpayers would be required. The basic publication was thirty-five printed pages and had annexed to it six pages of "illustrative" tables of reserve ratios, etc., and forty-two questions and answers. Commissioner Caplin's concurrent statement said that the Internal Revenue Service "is planning a series of training programs to familiarize tax agents with this new tool" and that at "a later date it is expected that seminars will be held for representatives of industry in our regional and district offices" (R-517). The original Guidelines publication portended the subsequent publication of a series of highly complicated tables and formulae to determine whether a taxpayer's retirement practices justified its use of the shorter lives suggested.

Not until September 17, 1962, over two weeks after the conclusion of the testimonial hearing below, were the actuarial tables and formulae necessary to evaluate Guidelines published (IRS Publication No. 457). That publication contains sixteen pages of fine print tables relating to reserve ratios, rate of growth conversions and adjustments for class lives. It has three pages of related algebraic formulas.

It was another eleven days, or September 28, 1962, before the Treasury published Internal Revenue Bulletin 1962-40 containing additional questions and answers (43 through 59) in respect of Guidelines. These disclosed for the first time important aspects of the interplay of Guideline lives with accelerated depreciation (*e.g.*, questions 44

*This official accompanying release did not even advert to the three-year so called "honeymoon" aspect of the publication, seized upon by the West Virginia Commission to lower appellant's local retail rates.

and 58), the relationship between use of Guideline lives and claimed salvage values (question 45) and some special aspects of Guideline lives vis-a-vis appellant's gas production properties (question 47), etc.*

Guidelines, of course, were not included in the stipulated issues at the prehearing conference below, which took place on June 27, 1962, prior to their publication (J. S. 3b, 4b). Indeed, the West Virginia Commission's staff stipulated at the conference that it would accept as appellant's federal income tax allowance for rate purposes the "actual taxes paid" (R. 58). At the hearing, August 27-30, there was evidence (however impromptu) on the subject of Guidelines, *viz.*, that:

> (a) appellant commenced studying the then available Guidelines materials immediately after their promulgation (the preceding month) and, under the terms thereof, had until the summer of 1963 to determine how it would file its federal income tax return for 1962;
>
> (b) appellant's tentative conclusion was that, since the propriety of the use of Guideline lives depends on replacement and retirement patterns, notwithstanding the "honeymoon", appellant should not shorten the useful lives employed for tax purposes unless such shortened lives would be consistent with existing retirement practices or unless it intended to accelerate retirements to achieve such consistency (R. 1289-90, 1292-95).

As the Solicitor General has noted, other undisputed evidence of record, accepted by the Commission in its findings, showed that (i) appellant's book depreciation rates (including the useful lives on which they were predicated) were identical with the rates (and useful lives) which it

*Subsequently, many additional "questions and answers" were issued to supplement and clarify the materials referred to above.

used for federal income tax purposes and (ii) those rates were properly used to determine depreciation expense for purposes of the retail cost of service (*i.e.*, they reflected the physical facts of depreciation and retirement which constitute the controlling federal criteria as to the use of Guidelines) (J. S. 16b).

Needless to say, appellant was not aware that its rights would later be claimed to have been forfeited because of its failure to formulate and communicate its final negative conclusions in respect of Guideline lives before the West Virginia Commission rendered its adverse decision on the requested rate increase on October 17, 1962. That order simply said that anyone could use the "honeymoon", that appellant had a duty under state law to do so and that its rates would presume that it fulfilled that duty (J. S. 15b-16b). In its amended petition for rehearing, appellant advised the Commission that it had by then definitely concluded that it could not properly, and would not, use Guideline lives (R. 137a, 149a-17). This amended petition was timely and set forth in detail the reasons in support of appellant's conclusion. It unequivocally advised the West Virginia Commission that appellant would not collect any phantom taxes if its retail rates were based on actual tax depreciation practice.* In denying rehearing, the majority of the Commission, in face of the plain fact that appellant's amended petition added significantly to the original record, found that "the matters alleged in said petitions were fully considered by the Commission before entry of

*The suggestion in the Motion that the West Virginia Commission had to avoid a possible boon to appellant resulting from the latter's claiming Guideline lives for federal income tax purposes after its retail rates had been fixed is frivolous. Sections 2554-5 of the West Virginia Code of 1961 (Michie's) empower the Commission to initiate rate reduction proceedings on its own motion and this power certainly can be exercised swiftly and effectively to avoid any recoupment of "phantom" taxes from the West Virginia consumers.

its said order of October 17, 1962" (J. S. 36b). Since the tax decision communicated in the amended petition for rehearing was entirely new and could not possibly have been considered at the hearing, it must be presumed that the Commission considered it immaterial to its original order and its final order that (i) appellant would not, in fact, use Guideline lives and (ii) *a fortiori*, that it had not, at the time of the hearing, made up its mind whether it would.

In light of the foregoing chronology and the terms of the order denying rehearing, the decision below simply could not have been based on the inability of appellant's witness at the August 27-30, 1962 hearings firmly to commit appellant against the use of Guideline lives on its federal income tax returns. Indeed, where federal law (the Guidelines) admonishes careful and complicated studies as a prelude to a taxpayer decision in respect of its federal income tax return, the taxpayer's insistence on completing such studies prior to making its decision (within a reasonable time) plainly cannot be, *as a matter of federal law*, an adequate state ground for decision.

The decision below was plainly based on the misapprehension of federal law referred to in the Memorandum of the Solicitor General *and* on the assumption that West Virginia Commission was free (*i.e.*, not constitutionally precluded by Section 167 and the regulations thereunder) to apply its own criteria to control appellant's federal tax decision, apparently on the theory that a utility management must take advantage of available cost economies for the benefit of consumers.

It is also plain that the West Virginia Commission did more than misapprehend federal law. The Commission *acted* under a misapprehension which had no support in the record and fixed a rate which would either *coerce* appellant into claiming an improper federal income tax deduction or

*penalize* it for not doing so. Congress certainly did not intend that the West Virginia Commission should be permitted to thwart federal fiscal objectives by indirection. The Constitution precludes any such effort by that Commission and protects appellant from the impact of that effort. It is submitted that the propriety of this state action should now be fully examined and resolved by the Court.

2. *Cost Apportionment.* (a) In response to appellant's extensive argument under the Natural Gas Act and the Supremacy Clause, the FPC staff* rested its argument on a truism, with which no one disagrees, embellished by "illustrations" which are either invalid or miss the point.

The truism is that the Natural Gas Act gave the Federal Power Commission jurisdiction to fix rates for interstate wholesale sales and left to the states jurisdiction to fix retail rates. While true, this is no help in solving a problem which relates to the apportionment of an admittedly indivisible "joint cost" between interstate and intrastate jurisdictions.**

The FPC staff's "illustrations" are no more helpful than the truism. *Of course* a state commission may use

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*We feel justified in attributing to the FPC staff the Natural Gas Act computations and argument in this section, not only because of their content but because of factual opinions expressed on regulatory matters *dehors* the record, *e.g.*, on the possibility that Columbia Gulf's costs have declined "as we believe they have" (fn. 7, p. 13). See also letter of correction, dated March 11, 1964, of Howard E. Wahrenbrock, Esq., Solicitor to the Federal Power Commission.

**The West Virginia Commission's allocation of the transportation cost wholly to commodity had no purpose or effect except to reduce the amount of West Virginia's cost responsibility. It had no intrastate purpose or effect because West Virginia retail rates, unlike FPC wholesale rates, are not two-part rates—the retail rates do not have demand and commodity components. Such statements as that

a rate of return in fixing retail rates different from that used by the Federal Power Commission in fixing wholesale rates. There is not even a theoretical "disparity" in such a case (let alone a constitutional question) because, all other things being equal, the proper rate of return for a retail business may well differ from that for a wholesale business. And *of course* a state commission, in determining retail rates subject to its jurisdiction, may use a rate base method which differs from that used by the Federal Power Commission. Rate base, with rate of return, is one of the basic determinants of the dollar amount of *earnings* to which a utility company is entitled over and above its recovery of *out-of-pocket costs*. These illustrations are in no sense like the problem here.

Even the FPC staff's mathematical analysis of the matter of "confiscation" reflects its blindness to the central problem of this case. The staff (Memorandum, pp. 13-14) calculates that appellant's inability to recoup, between its FPC rates and its West Virginia retail rates, about 800,000 dollars of charges lawfully paid to Columbia Gulf will only reduce its presumed over-all rate of return (interstate and intrastate) to 6.2 per cent. Since a mixed inter-intrastate utility is entitled to a fair return on its intrastate rate base from its retail rates (and a state served at retail can not "free load" on the utility's interstate business and customers in other states), the staff calculation should have been on a West Virginia retail basis only. On such basis, the 800,000 dollar out-of-pocket loss would reduce ap-

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of the staff (Memorandum, p. 9) that "Nothing in the federal statute directs a State agency how to make cost allocations on matters within its jurisdiction", while true, simply miss the point. The question here is what part of the joint cost *is* within federal and what part *is* within state jurisdiction.

pellant's West Virginia rate of return from 6 per cent to about 4.9 per cent.*

In *United Fuel Gas Company*, 29 F. P. C. 90, 95, 97 (1963), the Federal Power Commission, in approving acquisition by appellant of a small affiliated West Virginia retail company, perceived what its staff here seems unable to perceive. The federal agency itself recognized West Virginia's chronic and deliberate refusal to pay its federally determined share of the interstate costs incurred in serving its consumers and the resulting conflict with federal regulation when it said:

> "... The chief reason advanced by applicants for the proposed merger is that Amere, in the regulation of its retail operations by the West Virginia Public Service Commission, consistently has been unable to recover the full cost of gas purchased from Atlantic [full, federally determined, costs of its interstate gas supplies furnished by Atlantic, another affiliate]. Applicants recount, in their brief, the rate problems arising from differences between the rate requirements of this Commission and those of the State agency [the latter's refusal to accept federally determined costs]. These problems need not be detailed here other than *to acknowledge that, for many years, the West Virginia Commission has permitted Amere to include in its cost of service only a portion of the*

*Another disturbing implication in the staff analysis of the impact of the state action below on appellant is found in footnote 7 on page 13 of the Memorandum, *viz.*, that the legitimacy of West Virginia's action, which purports to have been based on the record in this case and which should be justifiable only in terms of that record, should be viewed by this Court on the basis of the staff's beliefs as to subsequent events. The footnote suggests that appellant's Columbia Gulf charges have decreased, but it does not advert to possible offsetting or more than offsetting increases in other costs legitimately incurred. In fact, the dollar gap resulting from the present regulatory conflict increases each year as the Columbia Gulf facilities are expanded annually to meet growing market requirements. That gap currently runs over $1,000,000 annually.

> *actual rates charged by Atlantic, even though such rates had been approved by this Commission. . . .*
>
> ". . .
>
> ". . . Moreover such merger, by eliminating differences as to rate requirements between the Public Service Commission of West Virginia and the Federal Power Commission, will resolve *a longstanding conflict between State and Federal regulation*, thereby advancing one of the fundamental purposes of the Natural Gas Act, namely, to effectuate a coordinated system of State and Federal regulation, each complementing the other." (Emphasis and bracketed materials supplied.)

It seems clear that the truism and the inept illustrations on which the FPC staff relies in the Memorandum are of no help in the present case because the subject matter at issue is the apportionment of a *joint* cost—the cost which appellant incurs to have its gas transported from the Southwest to West Virginia. This Southwest gas cannot be physically segregated into two streams, one which appellant will sell ultimately to its interstate wholesale customers and one which it will sell to West Virginia retail customers. The cost of that transportation therefore cannot be segregated and separate cost tags attached to the MCF's destined for interstate sale and those destined for West Virginia retail sale. Here, a state commission has disallowed an actual and undisputed out-of-pocket operating expense which the Federal Power Commission, as delegate of the legislative Power of Congress, has already determined is just and reasonable and has already determined is to be recouped solely from the intrastate business. A fifty-fifty allocation of a single integral expense item as opposed to a sixty-forty, ninety-ten, or one hundred-zero allocation of the same integral expense item are not merely "disparities" in method; they are in obvious conflict.

The brief of the FPC staff, in its Supremacy Clause discussion, devotes not a word to *Northern Natural Gas Co. v. Kansas Commission* 372 U. S. 84.* In light of the agreement on all sides as to the basic facts, it seems clear that whether *Northern Gas* governs the present case presents a substantial federal question. In each case the state order dealt with a matter normally within its proper sphere of jurisdiction. In each the state order directly affected a natural gas company engaged in interstate commerce. In each an alternative course of action was available to the company which involved only dollars—Northern, through assumption of the extra "take or pay" costs of the Republic "A" contract which compliance with the state order would impose upon it (750,269 dollars, Memorandum for the Federal Power Commission in No. 62 October Term, 1962, p. 30); appellant, through assumption of the difference left between the aggregate of the state and federal allocations of transportation expense and the total expense which by federal law must be paid (approximately 800,000 dollars).**

In each case the exaction could be passed on to interstate purchasers (rather than investors in interstate pipelines) if the Federal Power Commission were willing to do so. In each case, if the FPC be unwilling (as it is in this case)

*There is instead a brief reference in the discussion of the possible burden on interstate commerce, notwithstanding that the whole thrust of the opinion in *Northern Gas* is bottomed on the Supremacy Clause and federal preemption. Curiously (or perhaps significantly) the staff, in its Memorandum to this Court in *Northern Gas* (No. 62 Oct. Term 1962, p. 23) said that the "essence" of its contention there was that the Kansas action would "impose burdens, in the form of increased rates, upon consumers in other States."

**As to the FPC staff's suggestion that the $800,000 figure may not be accurate because of developments subsequent to the close of the record, it is certain that, apart from the dubious nature of such an approach, the constitutional question would be the same if the figure were halved or quartered.

to permit recoupment from interstate customers, the interplay of state and federal regulations will impose a burden on the pipeline investors and the company management will tend to pervert its operations to avoid the loss. Northern would tend to juggle its purchases as among Kansas, Oklahoma and Texas to minimize the impact of the Kansas proration order and appellant would tend to decline to expand service from the Southwest through the Columbia Gulf line. If anything, the present federal-state jurisdictional conflict over cost responsibility is far more grave than the conflict over purchases involved in *Northern Gas*.

In passing the Natural Gas Act "Congress contemplated a harmonious, dual system of regulation of the natural gas industry. . . ." See *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 467. As the Court said in *Northern Gas*:

> ". . . Moreover, any readjustment of purchasing patterns which such orders might require of purchasers who previously took unratably could seriously *impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other states.* This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority. . . .
>
> "It may be true, as the State Commission urges, that accommodation on the part of the Federal Power Commission could avoid direct collision—but this argument misses the point. Not the federal but the state regulation must be subordinated, when Congress has so plainly occupied the regulatory field. . . ." (372 U. S. at 92-93; emphasis added.)

The essence of the Supremacy Clause is that state policy must give way to federal policy where the latter has been

validly established by Congress. As a result, West Virginia is indisputably not free to interfere either with appellant's wholesale rates or with its interstate facility and gas procurement programs (all of which have been certificated by the Federal Power Commission under Section 7 of the Act). While West Virginia is free to implement its legitimate local retail rate policies, it is not free to adopt a local policy which attempts (and in the past has succeeded) to avoid payment of its share of regulated *interstate* costs, leaving consumers in other states to do so. (We emphasize "*interstate*" costs because the Columbia Gulf costs are clearly and solely such.)

"Free loading" on appellant and its consumers in the other states which it serves at wholesale is a correct characterization of the West Virginia policy embodied in the decision below. The Motion discloses the underlying state policy by its strong emphasis on "West Virginia gas for West Virginians". The Motion points out as significant that, while 80 per cent of appellant's pooled gas supply in the Appalachian area comes from the Southwest, "it is still true that it purchases and produces more gas in West Virginia than it sells to West Virginia customers" and "that the West Virginia customer is charged as though 80 per cent of the gas came from the Southwest" (pp. 2-3). West Virginia also puts forth as relevant that "some of United Fuel's West Virginia's customers sitting virtually on top of a gas well pay for their gas as though 80 per cent of it came from the Southwest" (p. 3). This plainly is an *improper* ground for West Virginia's dissent from federal policy, because the entire concept of appellant's interstate system has been approved, step by step as it was constructed, by the Federal Power Commission under Section 7 of the Natural Gas Act as being in the public interest.

West Virginia has no *proper* ground whatever for its dissent from, and conflict with, federal policy:

(a) its demand-commodity classification is not made for any exclusively local purpose within its intrastate jurisdiction; as noted earlier, that classification does not enter into the design of retail rates since they do not have demand and commodity components; its only purpose and effect is, conflicting with the federal allocation, to free West Virginia of a federally determined proper share of the costs of rendering service;*

(b) its refusal to apply the *"Seaboard"*** fifty-fifty allocation of the Columbia Gulf transmission cost is inconsistent with its own use of the *Seaboard* fifty-fifty allocation for costs associated with appellant's transmission system; the Columbia Gulf line is, physically, nothing more than an extension to the Southwest production fields of appellant's transmission system;

(c) its refusal to apply the *Seaboard* fifty-fifty allocation to the Columbia Gulf transmission cost is contrary to the position of the intervening West Virginia cities below, all of which supported use of the *Seaboard* formula for the Columbia Gulf transmission cost.

If West Virginia is free to use a "cost classification" technique to decline to pay 800,000 dollars of appellant's Columbia Gulf transmission costs, why can it not so "class-

*The Federal Power Commission makes the demand and commodity allocation of total costs for two purposes: *First*, to apportion joint costs between intrastate retail and interstate wholesale responsibilities; *second*, to apply the demand-commodity allocation to the interstate wholesale portion so determined in order to design the interstate wholesale rates, as a method of distributing interstate costs among the various interstate wholesale customers. West Virginia uses the demand-commodity allocation *only* for the first purpose (and in so doing directly conflicts with the FPC apportionment).

**Atlantic Seaboard Corporation, 11 F. P. C. 43 (1952), discussed *infra*.

ify" and "allocate" all appellant's other interstate costs in a similar manner? Must West Virginia's implementation of its local policies become that naked and that extreme before federal policy is offended?

All the foregoing facts and considerations can also be articulated as raising substantial questions under the Commerce Clause and the Due Process Clause. Reading the Constitution as an organic whole it seems fundamental that the federal system it created was not intended to, and should not be permitted to, countenance the admitted results in this case. Appellant's cost recoupment from its interstate customers is limited by valid federal regulation and West Virginia's deliberate refusal to permit recoupment of the federally determined balance from local customers violates basic principles of common everyday justice. Neither the authors of the the Constitution nor the Congress in enacting the Natural Gas Act could have intended such a result as the price of federalism.

(b) The West Virginia Commission recognizes the impropriety of conflicting federal-state cost allocations when it says (Motion, p. 8) that, of course, it "would not agree to one method of classification before the Federal Power Commission while adopting another for the same company in West Virginia". However, it claims that it is constitutionally free to fix a rate based on a conflicting allocation because appellant's FPC rates were approved by the Federal Power Commission, not after litigation and adjudication, but as a result of a settlement which was expressed to be "without prejudice" to the claims or contentions of any party.

That position ignores the fact that an interstate rate filed or fixed by the Federal Power Commission under the Natural Gas Act (and whether resulting from adjudication or settlement) becomes the legal rate and the only rate which can be charged or paid. That rate, in this case, by its de-

sign and its dollar levels, intends that appellant recoup only eighty-nine and one-half cents out of every dollar it pays to Columbia Gulf for transmission of Southwest gas to the Appalachian area and it requires that West Virginia permit appellant to recoup the remaining ten and one-half cents (not merely eight cents) of that dollar of out-of-pocket cost. In our view these are the controlling constitutional facts.

It would be a gross injustice for appellant's constitutional rights in this case to depend on the fortuity that, technically, the Federal Power Commission allocation disputed by West Virginia was embodied in a rate settlement. The character of federal law with which appellant's federal rates are endowed has, as to this matter of fifty-fifty classification of a transmission cost, much deeper roots than merely the proceeding in which these *particular* rates were approved. The Federal Power Commission has enforced, on an industry-wide basis, the fifty-fifty classification of transmission costs ever since its adoption of the so-called "Seaboard formula" in 1952, in *Atlantic Seaboard Corporation*, 11 F. P. C. 43. *Seaboard* held that a transmission cost, even though a fixed or capacity cost which did not vary with volume of service, should nevertheless be classified fifty per cent. to demand and fifty per cent. to commodity. The *Seaboard* formula has ever since remained a cornerstone in Federal Power Commission determinations of interstate natural gas rates.*

*For example, the Federal Power Commission recently said, in ruling that a lateral line to a production field should be treated (for purposes of cost classification) as a transmission line:

> "The Laverne Field lateral is 40 miles long, has a diameter of 20 inches, has a capacity of 200,000 Mcf of gas per day, is connected to the company's main line, and is in substance an extension of the main line. On these facts, this facility reasonably should be viewed as a transmission facility and the costs associated therewith treated as transmission costs, to be classified in conformity with *Seaboard* 50 percent to de-

With that background and with the Federal Power Commission's national application of the *Seaboard* formula, no other classification of the transmission costs in question in an FPC approved settlement was conceivable.*

Nor does the language in the FPC orders approving appellant's settlement rates, quoted in full in the Motion (pp. 7, 8), support the position of the West

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mand and 50 percent to commodity." American Louisiana Pipe Line Company and Michigan Wisconsin Pipe Line Company, 29 F. P. C. 932, 943 (1963).

Federal Power Commission decisions over the past twelve years to the same or similar effects are legion; *e.g.*, Northern Natural Gas Company, 11 F. P. C. 123 (1952); Panhandle Eastern Pipeline Company, et al., 13 F. P. C. 53 (1954); El Paso Natural Gas Company, 13 F. P. C. 421 (1954); Transcontinental Gas Pipe Line Corporation, 20 F. P. C. 843 (1958); El Paso Natural Gas Company, 22 F. P. C. 260 (1959); Kansas-Nebraska Natural Gas Company, Inc., 25 F. P. C. 448 (1961); Kentucky Gas Transmission Corporation, 26 F. P. C. 795 (1961); and Southern Natural Gas Company, 29 F. P. C. 323 (1963).

*We omit extended discussion of what effect the West Virginia Commission's contention if upheld could have upon the Federal Power Commission's comprehensive program of arriving at interstate rates by settlement procedure. This Court is familiar with the tremendous backlog of undecided cases which had accumulated on the FPC docket and of the chaotic state which layer upon layer of undecided FPC rate cases had produced in the natural gas industry. In the settlement procedure the "without prejudice" clause is a standard provision of Commission orders. That procedure has been the means by which the Commission has very substantially reduced its accumulated backlog.

A very large number of rates in the present interstate natural gas rate structure are based on settlement agreements containing the "without prejudice" provision. For example, in its annual report to Congress for the year 1961, the Federal Power Commission reported that of thirty-one rate increase applications disposed of during fiscal 1961, thirty were completed through conference procedure (p. 77). The 1962 report (p. 83) pointed out the important advantages derived from the settlement procedure and the 1963 report (p. 122) noted that most of the rate cases disposed of that year were settlements. We do not attempt to assay what would be the effect if it were held that none of this substantial part of the interstate natural gas rate structure had the force of federal law.

Virginia Commission. In the first place, we do not believe it is possible for a party (including a state regulatory agency) effectively to reserve a right to disregard federal law (or, in the case of a state agency, to enter a local order, affecting an interstate natural gas company, which conflicts with federal law). Secondly, we do not believe that such language purported to reserve to the state agency a right to do what it did. No doubt this language left the West Virginia Commission free, as it left all other parties to the federal agency proceedings free, of any estoppel by reason of the settlement or the order. The West Virginia Commission was free, as were all other parties, to assert in the future (whether or not there was any change in circumstances) that a different procedure should be used and a different result reached in any future proceeding. But that is not freedom to any party, sovereign state or private corporation, to disregard the federal rate or rate structure, nor freedom to West Virginia to attack it collaterally by an order of its Public Service Commission.

## CONCLUSION

The motion to dismiss or affirm should be denied and this Court should note probable jurisdiction in respect of both questions presented.

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